

There thus appears to be no rational basis for imposing a freeze on the continued filing and processing of applications for authorizations in the shared frequency bands. The *Notice* provides no additional explanation of the justification for halting the activities of carriers and private licensees in these bands. Indeed, the language included in the *Notice* initially suggested to many licensees that the Commission was going to continue to accept and process such applications during the pendency of the subject rulemaking.³³ The public interest clearly would best be furthered by immediately lifting the freeze on applications for shared frequencies and by the Commission resuming the processing and granting of such filings.

B. The Commission Should Also Immediately Lift the Freeze on the Acceptance and Processing of Applications for Common Carrier Lower Band Frequencies

As with the shared Part 90 frequencies, the Commission's freeze on lower band common carrier applications most dramatically affects smaller and mid-sized paging companies. Moreover, the *Notice* itself recognizes that these paging channels are heavily licensed:

Current licensing activity on the lower paging bands is confined largely to the addition of fill-in sites and minor expansion by existing licensees. Such activity suggests that there is relatively little desirable spectrum that remains available for licensing on these channels.³⁴

³³ See *Notice*, ¶ 149.

³⁴ *Id.*, ¶ 13.

This suggests that there is little "white space" that could be subject to auction even if the Commission adopted geographic licensing for these bands.

The paging industry has in the past opposed transitioning licensing in these frequencies to a market area basis.³⁵ Because of the maturity of frequency use in these channels, as recognized by the Commission, market area licensing simply is not required to facilitate system implementation in the same manner as is the case in the 931 MHz frequencies. In fact, conversion to market area licensing would be highly disruptive to the existing operations of the licensees in these bands.

In the absence of the adoption of geographic licensing for the lower band Part 22 frequencies, there is no reason for the Commission to maintain its freeze on the acceptance and processing of applications for these channels. In those circumstances, it seems that accepting and acting on such authorization proposals would not "impair the objectives of this proceeding."³⁶ At the same time, the harm suffered by the licensees of these channels and their customers as a result of not being able to make system modifications or enlargements for the foreseeable future is significant. The public

³⁵ The combination of this traditional opposition and the Commission's consideration of adopting market area licensing for these lower band Part 22 paging frequencies means that the industry now must spend time evaluating the Commission's consensus. This evaluation cannot be lightly undertaken either by the industry or the Commission -- another factor suggesting to PCIA that resolution of the underlying rulemaking will necessarily take longer than anticipated by the Commission, thus further prolonging the harm caused by the freeze in these channels.

³⁶ *Id.*, ¶ 139.

interest would be far better served if the freeze affecting lower band Part 22 channels were lifted.

C. The Freeze Should Be Modified To Permit Licensees in the 931 MHz and 929 MHz Exclusive Frequencies To Engage in Necessary Expansion Where the Spectrum Is Useful Only to the Incumbent Licensee

The *Notice* provides that, "during the pendency of this proceeding, we will allow incumbent licensees to add sites to existing systems or modify existing sites, provide that such additions or modifications do not expand the interference contour of the incumbent's existing system."³⁷ The *Notice* states that this exception is intended to give existing licensees flexibility in their operations "without affecting spectrum availability to others."³⁸ As indicated in the discussion above in Section II.D about the harm to existing licensees resulting from the freeze, this exception does not, as contemplated by the Commission, "allow incumbent licensees to continue operating their businesses and meeting public demand for paging services during this rulemaking."³⁹

Moreover, statements contained in the *Notice*, when combined with the status of other open proceedings affecting paging operators, have created uncertainty about the

³⁷ *Id.*, ¶ 140.

³⁸ *Id.*

³⁹ *Id.*

full range of permissible and impermissible activities under the terms of the freeze.

While PCIA has sought clarification on some of these matters from the staff,⁴⁰ PCIA urges the Commission promptly to clarify that:

- Exclusive frequency 929 MHz licensees with time remaining on their eight month construction period may complete system build out and retain their exclusive license;
- Licenses required to comply with the *PCP Exclusivity Reconsideration Order* concerning multifrequency transmitters⁴¹ will retain their exclusive licenses so long as they comply with the six month deadline imposed in that order; and
- Any 929 MHz licensees that requested extended implementation or slow growth will be given a reasonable period of time to complete construction and retain its exclusive frequency authorization if the Commission decides not to grant such request.⁴²

As noted in Section I above, certain statements contained in the *Notice* have created confusion as to the definition of the interference contour that may be used by 929 MHz and 931 MHz licensees as the basis for determining permissible additions and modifications that may be implemented during the effective period of the freeze. The *Notice* could be interpreted as permitting these licensees to make modifications only

⁴⁰ See Letter to David Furth from Mark J. Golden (Feb. 20, 1996).

⁴¹ *PCP Exclusivity Reconsideration Order*, ¶¶ 30-31.

⁴² PCIA suggests that this construction term should provide a reasonable period of time from completion of the proceeding addressing extended implementation or slow growth requests, or from the date of a notice given by the Commission. These requests could be treated similarly to the grandfathered licensees that had requested rule waivers to come into compliance with the Commission's decision with respect to use of multi-frequency transmitters. See *id.*

within the interference contour as the Commission has proposed to define it for 931 MHz. Adoption of that interpretation would seriously undercut the relief the Commission has sought to provide in allowing modifications within existing interference contours.

First, all Part 929 MHz and 931 MHz licensees would have to completely recalculate their system parameters according to a proposed formula (that may or may not be adopted) to determine permissive modifications during the freeze. This would be both time consuming and resource intensive, with little apparent benefit.

Second, the proposed formula contemplates a much smaller interference contour than is currently specified in existing Commission rules for either 929 MHz or 931 MHz. As a result, carriers would be able to make many fewer modifications than would be the case if the currently prescribed contours (for Part 22) or protected areas (for Part 90) were used.

Third, to the extent the Commission is substantively reducing the protected service area of licensees in the context of its freeze order, that action is infirm. Specifically, any reduction in the service areas of existing licensees must be subject, at minimum, to notice and comment procedures,⁴³ which has not yet occurred.

PCIA thus urges the Commission to clarify that it is not in any way altering the existing service and interference contours for 931 MHz licensees or the protected service areas of 929 MHz licensees. In addition, licensees should be permitted to make

⁴³ See 5 U.S.C. § 553.

changes based on the existing interference contour rules now applied to 931 MHz authorizations and extended to 929 MHz operations for the purpose of making permissive modifications during the freeze period.

In addition to granting the requested assurances, PCIA urges the Commission to take further action to modify the freeze as it affects 931 MHz and 929 MHz exclusive frequency licensees.

1. The FCC should process all applications filed with it as of the date of the freeze

The Commission plans to process, until the subject proceeding is concluded, only those pending applications that are not mutually exclusive with any other application and for which the applicable period for filing competing applications has expired as the adoption of the *Notice*.⁴⁴ While PCIA understands the rationale for holding mutually exclusive applications in abeyance until appropriate competitive bidding rules are in place to govern the resolution of such applications, equity dictates that any applications *filed* with the Commission (or Mellon Bank, as the Commission's agent for the acceptance of filings accompanied by application fees) as of the *Notice* adoption date should be processed.

Such processing can be maintained by the Commission continuing to apply its rules governing the acceptance and public notice of applications. Specifically, the

⁴⁴ *Notice*, ¶ 144.

Commission could prepare and release additional public notices listing applications that have not yet appeared on public notice. Clearly, entities would be entitled to file mutually exclusive applications in response to any application listed on the public notice -- with the result that such applications would not be processed (and may be dismissed) until this proceeding is completed. The already filed applications were submitted to the Commission in good faith, as licensees sought to implement established business plans, improve system performance, and respond to competitive pressures and customer service demands. Now, not only are such licensees barred from filing new proposals, they also must face the prospect that the system modifications and/or expansions underlying the pending, non-noticed applications cannot be implemented for the foreseeable future.

The Commission has provided no explanation why all pending applications cannot or should not be processed. Revising the freeze in order to process all applications filed with the Commission or Mellon Bank would serve the public interest. Moreover, such action is consistent with considerations of equity, given the submission of some applications well in advance of the imposition of the freeze, but with the bad luck not to have made the December 6, 1995 public notice.

2. The Commission should permit additional expansion by 931 MHz licensees in the circumstances defined below

As the Commission is aware, very few applications in the 931 MHz band were granted during most of 1995. This resulted from the number of applications being filed, mutual exclusivity daisy chains, and an inadequacy of staff resources to review and act on the applications. PCIA and its members worked with the Commission staff in refining the necessary computer algorithm and updating the Commission's records. This effort has begun to show results only very recently, with the first set of grants reflected in a public notice released at the end of January.⁴⁵ Commission action on the pending applications clearly will affect licensee needs to make further system modifications -- which still cannot be determined in many cases because the staff is continuing to process the pre-1995 applications before proceeding with applications filed since January 31, 1995.

PCIA urges the Commission to revise its application freeze and processing policies to accommodate additional system modifications and expansions in 931 MHz frequencies consistent with the following conditions:

1. Pending 931 MHz applications that have not appeared on the December 6, 1995 public notice or earlier public notices should be modified to specify a particular

⁴⁵ See FCC Public Notice, "Wireless Narrowband Branch Information," Rpt. No. NCS-96-13-A (Jan. 31, 1996); FCC Public Notice, "FCC Completes First Run of Its New Software for the Processing of 931 MHz Paging Applications," DA 96-219 (Feb. 22, 1996).

931 MHz frequency. The Commission could grant such applicants a specified period of time in which to submit the modification, such as 30 days or two weeks from the date of a public notice or decision announcing the policy.

2. Any new applications for 931 MHz channels filed during the pendency of the rulemaking must specify a particular frequency.

3. Competing applications could be filed during the 30 day window applied to other Part 22 applications under the current rules.

4. If a mutually exclusive application is filed, the parties would not be allowed to resolve the situation by settlement. Rather, the applications would be removed from the processing line and held in abeyance pending resolution of the market area licensing rulemaking itself.

As described below in Section III.F, permitting the filing of 931 MHz applications subject to these guidelines will allow paging service providers more effectively to respond to the demands of existing customers and the public for service, and to meet marketplace competition.

3. The Commission should permit additional expansion by 929 MHz exclusive frequency licensees consistent with the following limits

In the 929 MHz band, the Commission adopted exclusivity policies less than three years ago. Many licensees have been acting to build out their systems consistent with the policies adopted at that time. In addition, a number of critical issues for some

929 MHz exclusive licensees, raised on reconsideration of the initial decision, were not resolved until the release of a Commission decision subsequent to the adoption of the *Notice*. Similarly, a number of licensing issues remain outstanding, including identification of all licensees that have been granted final exclusive authorizations. This portion of the paging marketplace thus has been under considerable regulatory flux and uncertainty, while licensees have sought to establish the required operations. The open regulatory issues as well as rational business planning clearly have affected licensee system planning.

PCIA urges the Commission to revise its application freeze and processing policies to accommodate additional system modifications and expansions in 929 MHz exclusive frequencies consistent with the following conditions:

1. Incumbent exclusive licensees should be allowed to file applications for new stations within 40 miles of their existing composite license areas, subject to applicable frequency coordination requirements.
2. The Commission should adopt an interim licensing procedure for 929 MHz exclusive frequencies that permits the filing of mutually exclusive applications in a procedure similar to that followed for common carrier frequencies.
3. As with 931 MHz, if mutually exclusive applications are filed, the parties would not be permitted to resolve the situation by a settlement. Rather, the mutually exclusive applications would be held in abeyance until their treatment or dismissal is resolved in the underlying geographic area licensing rulemaking.

As is the case with 931 MHz, permitting the filing of 929 MHz exclusive frequency applications subject to these guidelines will allow paging service providers more effectively to respond to the demands of existing customers and the public for service, and to meet marketplace competition.

D. Modification of the Freeze Consistent With These Parameters Will Further the Public Interest

Adoption of the freeze modifications outline above will substantially accommodate the needs of licensees to make systems modifications and incremental expansions in order to meet customer need and remaining fully competitive. Without these alterations, it seems likely that the successful, commended competition that now exists in the paging marketplace today will be seriously undermined. In light of recent statutory and regulatory developments, the Commission should ensure -- as it has indicated that it wants to do -- that an entire segment of the CMRS marketplace is not displaced merely as a result of regulatory fiat.

In crafting these recommendations in order to permit paging operators more appropriate flexibility to make system design decisions, PCIA has been mindful of the Commission's concerns about unduly reducing the "white space" that may be available for competitive bidding. Initially, as the *Notice* concludes, existing paging frequencies are heavily used, and leave little viable opportunity, in many markets and on most frequencies, for the emergence of legitimate competing applicants for geographic

service area licenses.⁴⁶ Specifically, the *Notice* points out that the Commission's records reflect that common carrier paging "channels are heavily licensed, particularly in major markets."⁴⁷ In the VHF and UHF channels, the *Notice* posits that there is relatively little "desirable" spectrum available for licensing.⁴⁸ While the Commission believes that it may be possible to recover some 931 MHz spectrum through cancellation of unconstructed authorizations, even then such frequencies are "scarce" in virtually all major markets and most mid-sized markets.⁴⁹ A similar situation exists in the 929 MHz band.⁵⁰

Thus, there are serious questions about how many competitive bidding opportunities will actually develop at some time as the Commission adopts geographic service areas and a competitive bidding licensing mechanism. To the extent that both interest and opportunities exist, however, affected entities now are entitled to file mutually exclusive applications. While the Commission has not previously adopted the specific auction mechanism for mutually exclusive Part 22 (or Part 90) applications, it is the case that current rules require any mutually exclusive application situation be

⁴⁶ This is particularly the case if the Commission adopts its proposal to "require the geographic licensee to meet its coverage requirement directly (*e.g.*, by utilizing vacant spectrum or acquiring such spectrum through buy-outs of incumbent licensees)." *Notice*, ¶ 43.

⁴⁷ *Id.*, ¶ 13.

⁴⁸ *Id.*

⁴⁹ *Id.*, ¶ 14.

⁵⁰ *Id.*, ¶¶ 17-18.

subject to competitive bidding. Thus, an interested entity does not need to sit idly by while an incumbent licensee expands into area that might otherwise justify the new applicant's interest.⁵¹ Under the parameters outlined above for interim application processing, any mutually exclusive application situations would be subject to the Commission's action in this rulemaking.

PCIA believes that the cumulative result of adoption of its proposal would a very limited reduction in auctionable "white space," consistent with the Commission's objectives. At the same time, paging licensees would be able to make necessary modifications to meet consumer needs and preserve their competitiveness. In the case of private licensees operating internal systems, they would be able to make the changes necessary to support their primary activities. The public interest thus would be most effectively served by striking this new balance.

E. The Paging Industry Is Sufficiently Different From Other Situations Where Application Freezes Have Been Imposed To Warrant the Requested Interim Processing Relief

The *Notice* indicates that imposition of a freeze on Part 22 and Part 90 paging applications during the pendency of the rulemaking is "consistent with the approach we have taken in other existing services where we have proposed to adopt geographic area licensing and auction rules."⁵² While the Commission has sought to grant limited

⁵¹ Interested parties also may take advantage of Commission petition to deny rules.

⁵² *Notice*, ¶ 139 (footnote omitted).

flexibility to paging licensees to make some modifications during the freeze in recognition of the vibrant, competitive nature of the marketplace, PCIA believes that the paging situation can be further distinguished from other licensing contexts to warrant grant of the relief requested in these comments.

As the Commission has recognized, and these comments reconfirm, paging licensees operate in a highly competitive environment, with substantial ongoing but evolving operations. This contrasts sharply with the situation at 220 MHz⁵³ and 38 GHz,⁵⁴ where the services at issue were still in a nascent stage. A freeze on applications for authorizations in those frequencies simply did not have the disruptive effect on an entire industry and its customers as does the freeze imposed in this proceeding.

In the 800 MHz specialized mobile radio ("SMR") context,⁵⁵ at least part of the reason for a freeze was to preserve spectrum for relocation of licensees operating in

⁵³ See *Acceptance of 220-222 MHz Private Land Mobile Applications*, 6 FCC Rcd 3333 (1991).

⁵⁴ See *Petition for Amendment of the Commission's Rules Regarding the 37.0-38.6 and 38.6-40 GHz Bands*, DA 95-2341 (Nov. 13, 1995) (Order); *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, FCC 95-500 (Dec. 15, 1995) (Notice of Proposed Rule Making and Order).

⁵⁵ See *Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services*, 9 FCC Rcd 7988, 8167 (1994); *Inter-Category Sharing of Private Land Mobile Radio Frequencies in the 806-821/851-866 MHz Bands*, 10 FCC Rcd 7350, *recon. denied*, 60 Fed. Reg. 39,660 (Aug. 3, 1995); *Licensing of General Category Frequencies in the 806-809.50/951-854.750 MHz Bands*, DA 95-2119 (Oct. 4, 1995).

channel blocks where the Commission proposed to implement wide area SMR systems. In paging, no such relocation is proposed and thus there is no need to preserve spectrum for a new "home" for relocated facilities. The 800 MHz SMR proceeding also involved implementation of a new technology in conjunction with wide area SMR operation; similar technical transition issues are not present for paging in moving toward market area licensing. Also, to implement wide area SMR, it was necessary to be able to allocate blocks of multiple channels to eventual market area licensees; paging services, in contrast, will continue to be licensed on a channel-by-channel basis.

Because paging can readily be distinguished from other services where a freeze was imposed by the Commission, and because of the devastating effect of the freeze on this marketplace, distinct interim processing rules can be justified.

F. A Workable Interim Licensing Process Is Necessary Because It Is Highly Likely That Resolution of the Underlying Rulemaking Will Take Many Months or Even Years

Although the Commission has committed to complete the underlying rulemaking as expeditiously as possible, in recognition of the disruptive effect of the freeze for this competitive marketplace, PCIA is concerned that the proceeding will turn out to be far more time-consuming than anticipated. Initially, the Commission has proposed market area licensing for frequency bands where no industry consensus on appropriate

geographic licensing policies and transition procedures has been developed.⁵⁶ The industry, which is striving to assist the Commission effectively and rapidly, still must address the specific rulemaking proposals. Moreover, for the lower band Part 22 frequencies and the Part 90 shared frequencies, the transition issues are far more difficult than those previously addressed by the industry in connection with its 931 MHz proposals. Clearly, appropriate transition mechanisms must be carefully crafted if geographic licensing is adopted in these other bands.

The Commission also is now in the midst of dealing with implementation of the Telecommunications Act of 1996. The Commission itself has made clear that initiation and consideration of the myriad of matters implicated by the new statute will divert substantial resources. While the instant proceeding is critically important to existing paging licensees and those entities interested in participating in this marketplace, PCIA recognizes that action on the rulemaking proposals is likely to take a lower priority as compared to many of the statutorily-required implementation proceedings.

Moreover, adoption of rules in this proceeding will not result in the immediate grant of licensees' needed additions and modifications. For those bands where market area licensing is adopted, it will be necessary to comply with required application and competitive bidding procedures, and in some cases complete an auction. In other bands, applications may have to be processed through public notice procedures. Thus,

⁵⁶ Indeed, the industry consensus is that there should be no geographic licensing for many of the Part 22 and Part 90 channels addressed in the *Notice*.

even once the Commission has completed action in this proceeding, procedural requirements will add further delay in seeking and obtaining Part 22 and Part 90 authorizations.

Past experience with other proceedings and other freezes also is cause for alarm for entities subject to the current freeze. It took over two years for the Commission to complete action on only the reconsideration phase of the 929 MHz exclusivity proceeding -- which was pending at the same time the Commission was working to implement elements of the Omnibus Budget Reconciliation Act of 1993. The 800 MHz SMR freeze has lasted for over one and a half years; the MMDS freeze lasted for over three years; and the 220 MHz freeze has lasted over four and a half years. Given these other situations, paging licensees naturally are alarmed that they will suffer a similar experience. These experiences that underscore the critical importance of Commission adoption of interim licensing policies that will more effectively permit licensees to respond to customer needs and marketplace pressures.

IV. SECONDARY LICENSING IS NOT ITSELF AN ADEQUATE ALTERNATIVE

The Commission as proposed that, "during the pendency of this proceeding, incumbents should be allowed to file new applications that would expand or modify their existing systems beyond their existing interference contours with such

modification receiving only secondary site authorization."⁵⁷ While this proposal appears to be superficially appealing and a solution to the concerns outlined above, modifying the freeze only to permit secondary licensing does not provide sufficient relief to existing paging licensees.

Specifically, while some licensees would take advantage of secondary licensing opportunities, other entities would make a business judgment that the benefits of secondary facilities are outweighed by the risks. Specifically, some businesses, lenders, shareholders, and financial markets would question the advisability of a licensee spending substantial sums of money to construct facilities that the licensee may later have to forfeit. If the facilities are given only secondary authorization, and any eventual auction in the market is not won by the licensee that constructed the facilities, it appears likely that the license would have to remove the facilities so as not to interfere with the geographic area licensee. The assessment of this risk in particular situations could, for example, affect lending decisions regarding equipment purchases and construction activities.

Paging licensees need much greater relief than is afforded by secondary licensing. While secondary licensing can have some benefit for the public interest, standing alone, it is inadequate to address the needs of paging licensees across all frequency bands.

⁵⁷ Notice, ¶ 143.

V. CONCLUSION

The modified freeze imposed by the Commission on paging licensees works a great disservice on the consumers of paging services and a highly competitive marketplace. PCIA urges the Commission to take prompt action to modify the terms of the freeze consistent with the proposals made above. Such action would benefit the public while seeking to protect the Commission's interests in adopting market area and competitive bidding licensing rules for Part 22 and Part 90 frequencies.

Respectfully submitted,

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March 1, 1996